

PUBLIC HEARING AGENDA REQUEST

Applicant:

Ray M. Pennington, III

Planning Commission Meeting Date:

March 29, 2007

Staff Lead:

W. Todd Benson, Assistant Zoning
Administrator

Department:

Community Development

Topic:

A Proposed Zoning Ordinance Text Amendment to Section 10-206 to Allow Certain Illegal Nonconforming Lots, in Existence Prior to January 1, 1980, to be Used for Any Use Permitted in the Zoning District Where it is Located and to Permit Any House that has been Erroneously Constructed on a Nonconforming Lot

Topic Description:

This proposed text amendment would allow illegal nonconforming lots to be used for any lawful purpose provided the lot is nonconforming due to minimum size, lot area, or width requirements and the lot existed prior to January 1, 1980. This would also make conforming any lot upon which a dwelling was constructed. Finally, it places size restrictions on dwellings constructed on nonconforming lots.

Requested Action of the Planning Commission:

Conduct a public hearing and make a recommendation to the Board of Supervisors.

Financial Impact Analysis:

No financial impact analysis has been conducted.

Summary Staff Report:

This text amendment is requested by Ray M. Pennington, III. Mr. Pennington owns 2.8 acres (Pin: 6958-38-7138) on Mountjoy Road. The parcel is zoned RC/Rural Conservation.

The County and Mr. Pennington are engaged in litigation over this parcel and whether it is buildable. The Zoning Administrator and, on appeal, the Board of Zoning Appeals have found that the lot is not a buildable lot, based on the following facts, findings and conclusions:

- The lot was a remnant of the 1973 Mountain View Estates subdivision; a residue created when a surveying error incorrectly established the boundaries of the site.
- When the error was discovered in 1977, the parcel was recorded on a plat stamped by Richard E. McNear as agent for the Board of Supervisors stating: “This transfer of land does not come under subdivision control and can therefore, be put to record.” Mr. McNear’s recollection was that the parcel was allowed to be recorded as a wood lot, not intended as a building lot.
- Because the minimum lot size for parcels in the Rural Conservation district at that time was 10 acres or 5 acres for a family transfer, the lot as configured could not have legally been created as a separate buildable lot.
- The lot was carried on the tax records as a separate lot, but was not taxed as a buildable lot, except for an error made in 2002 which was subsequently corrected.
- A building/zoning permit for a house on the lot was denied in 1987 upon an interpretation by the Zoning Administrator that the lot was not created as a building lot.
- Mr. Pennington purchased the land in 1993/1994, and, in 2003 submitted an application for a building/zoning permit to construct a home on the lot. In response to the request, Mr. Pennington was informed by the Zoning Administrator that his lot was non-buildable. Mr. Pennington appealed this decision to the Board of Zoning Appeals. The BZA affirmed the decision of the Zoning Administrator. Mr. Pennington then appealed to the Circuit Court where the case is pending.

Mr. Pennington’s proposed text amendment is designed principally to deal with his problem with the County, allowing him to construct a home on the subject lot.

Mr. Pennington suggests a text amendment to the Zoning Ordinance to allow the subject lot, and other unbuildable lots in the County, to become buildable, subject to certain limitations. As proposed, the amendment would make buildable any lot where a metes and bounds description or plat of survey was recorded in the land records of Fauquier County prior to January 1, 1980, or any lot that was identified as a separate lot on the Fauquier County real property identification map and taxed as a separate parcel on or before January 1, 1980. The amendment further specifies that development of the lot must meet all Zoning Ordinance requirements except minimum lot size, lot area and lot width requirements and limits the size of the house that can be built on the lot to 1,500 square feet for lots under 2 acres and 2,800 square feet for lots 2 acres or larger. In addition, the amendment proposes that any non-conforming lot that has had a dwelling already constructed on it be legalized, with limits on the extent of expansion allowed on such lots.

Staff Analysis

The proposed text amendment raises significant issues with potentially widespread implications. Staff has been independently assessing the issue of illegal and/or

unbuildable lots over the last year, with the thought of bringing forward a text amendment to the Board on the issue for consideration. The County's records are such that it is exceedingly difficult to determine in any comprehensive and systematic way the extent to which illegal or non-conforming lots exist and the extent to which these non-conforming lots are currently unbuildable. It is unknown just how many potential lots a text amendment on this issue could affect or where such lots are located.

There are two categories of lots which this text amendment potentially impacts:

1. Tax lots that aren't actually legal lots. These lots may be reflected on the Commissioner of Revenue records as separate lots, but, in fact, were never legally created as lots through the appropriate land use process. This category includes lots which may have been illegally transferred through metes and bounds descriptions (in violation of State & Local Codes) and lots which were actually recorded as boundary line adjustments—i.e., not new parcels, but additions to existing parcels—but then incorrectly mapped on Commissioner of Revenue records as separate lots.
2. Lots that do legally exist as separate lots, but which aren't buildable. These lots include those created for a variety of purposes: access, open space, wells or other utilities, wood lots, etc. Such lots often did not meet the zoning ordinance requirements in place at the time they were created because they were exempt from such requirements because they were not being created for house construction. In the case of open space lots, the lots may be necessary to meet the zoning requirements for a larger subdivision. In the case of access lots, well and other utility lots, many were often not utilized for that purpose or have been abandoned for that purpose and therefore have no use.

A third category of lots, those that were legally created but which do not meet the current zoning ordinance requirements, are not affected by this amendment, as proposed. Such lots are already considered buildable pursuant to Section 2-403 of the Zoning Ordinance, which provides *"if a lot was legally recorded prior to the effective date of this Ordinance, and said lot met the requirements of the Zoning Ordinance in effect at the time of recordation, then notwithstanding the minimum lot area, frontage and lot width requirements of the district in which located, said lot may be used for a use permitted in the district provided all other regulations of the district can be met."*

How Many Lots Fall Into Category 1 or 2, Above?

As noted earlier, it is difficult to determine how many existing lots in the County are illegal and/or unbuildable. One indicator is parcel size. For example, the current minimum lot size for RA and RC parcels is 2 acres. Filtering through the Commissioner of Revenue records in GIS shows more than 1,200 parcels zoned RA or RC which are less than 2 acres in size, with over 800 of these lots currently vacant. Many of these lots are likely buildable lots, falling under the third category noted above: lots created legally prior to the current regulations. But lot size is not the only indicator of lots that may have been illegally created or are unbuildable. Lots created for other purposes, such as utilities or right-of-way purposes, may very well be larger and meet minimum lot sizes. Many boundary line adjusted areas exceed two acres, but are still unbuildable as separate lots because they do not legally constitute separate lots.

Staff began keeping a list of unbuildable lots about a year ago, and to date 45 unbuildable lots have been identified. Most (87%), like the Pennington property, were not legally created as lots through the subdivision property. More specifically:

Type of Lot	Number of Lots	% of Lots
Lots “created” as boundary line adjustments; lots are actually part of another parcel but tax maps incorrectly show as separate parcel.	27	60%
Other lots not legally created through subdivision process, meeting zoning ordinance requirements, but mapped on tax maps as parcel.	12	27%
Lots created as open space.	4	9%
Other	2	4%
Total	45	100%

In addition, staff has identified “unbuildable” lots where homes have been built, to include an instance where the County issued building permits for such a home. It is not known how many other lots with existing homes may fall in this category. In the identified case, the “lot” was created through a boundary line adjustment, and is therefore legally part of another lot.

Proposed Text Amendment

Staff does not believe the proposed amendment reasonably or clearly addresses this very complex issue.

Part A of Mr. Pennington’s approach would make any lot described by metes and bounds or recorded on a plat prior to 1980 a legal buildable lot. This, in staff’s opinion, casts a very broad net and would legalize many of the unbuildable lots in the County, including those that were created specifically for other purposes (open space, access, wells, other utilities). In addition, the practice in the 1970s was to describe boundary line adjustments in metes and bounds or by a recorded plat, and it does not seem that the proposed language would exclude such boundary line adjustments, making any such area into a buildable lot (including those now shown in the land records as part of another lot).

Staff is even more concerned about part B of Mr. Pennington’s proposal, which would allow any parcel that existed as a separate lot in the Commissioner of Revenue records as of 1980 to have status as a buildable lot. Staff has found dozens of unbuildable parcels in the Commissioner’s records that were, in fact, created as boundary line adjustments into another parcel. That is, a parcel was not actually created, but rather a piece of one property was moved into the adjoining property. In many cases, this boundary line adjustment was incorrectly mapped, resulting in the boundary line adjustment area showing up as a separate lot in the Commissioner of Revenue records.

Despite being shown as a separate parcel on the map, few of these parcels which staff has found have actually been taxed as buildable lots. In most cases, these lots are still under joint ownership with the parcel to which they were to be added. It is not clear what public purpose would be served by converting all such slivers into buildable lots.

Part C of Mr. Pennington's proposal is unclear to staff. It seems to be saying that the parcels eligible through A & B above must meet all current Zoning Ordinance requirements except for lot area and width. Mr. Pennington's parcel actually meets the current Zoning Ordinance requirements for lot area and lot width.

Staff believes the broad language proposed in A, B & C would effectively convert most of the illegal lots in the County into legal lots and unbuildable lots in the County into buildable lots. While staff agrees that there are some instances where this might be appropriate, staff does not agree that almost every such lot should be so converted. Over the last year, the Zoning Administrator has done 17 interpretations on this issue, telling 17 different landowners that scraps of land reflected on the tax map parcel as separate lots are not, in fact, separate legal lots of record and, therefore, must be incorporated into the main parcel. Each of these parcels was under the same ownership as the lot to which it was legally joined, and while each had been taxed as a separate lot for years, none had been taxed as a buildable lot. Only one of these 17 property owners appealed the Zoning Administrator's determination, and the one who did withdrew the appeal after being shown clear evidence that the lot was, in fact, part of a boundary line adjustment into another lot. The proposed text amendment would have had the affect of transforming each of these "illegal" lots into legal, buildable lots, creating an economic benefit for the property owners, no doubt, but addressing no identifiable public policy problem.

That is not to say that there aren't cases which raise more difficult policy issues for the County, and the Pennington parcel is one of these. Certain factors suggest that it is unreasonable to make the Pennington lot buildable. The lot had been identified as unbuildable for almost 20 years, since 1987 when the former Zoning Administrator denied a permit to build a house on the lot. The lot has not been taxed as a buildable lot. The current owner purchased the land in 1993/94 and one could argue he knew or should have known it was unbuildable. Neighbors could have reasonably expected that no home would be built on the lot.

On the other hand, there are many factors in this case one could argue support converting the lot to be buildable. The lot could probably have been created in 1974 had most of the other lots in the subdivision been smaller and the surveyor hadn't made the error in the parent parcel boundaries. In addition, the lot meets the minimum two acre lot requirement in the Zoning Ordinance today for the zoning district. While most of the lots immediately adjacent are much larger, 10+ acres, immediately adjacent to the south is an even smaller RC zoned lot (1.5+ acres) with a home built on it.

Other specific parcels raise even more questions, and in staff's opinion, clearly support a text amendment to create a remedy. Most troubling as an example is an "illegal lot" on which a home has been built. The subject 2.0 acre parcel was actually created as a

boundary line adjustment in 1982 and was to be added to the adjoining 2.0 acre parcel. Zoned RA, the parcel does meet the minimum lot size requirements for the zone. It could not, however, be divided from the parent parcel today because no density remains to create it. A house was built on the property in 1992, with permits issued by the County. Because it was not legally a separate lot at the time, such permits should never have been issued. The property has subsequently sold, and the current owner had no involvement in the original transaction. Here is a case staff believes the Ordinance clearly needs to rectify. The lot has been listed on Commissioner of Revenue records as a separate lot, taxes have been paid as though it was a separate building lot, and the County contributed to the problem by issuing building permits for the property.

In conclusion, staff believes that an ordinance is appropriate to address the issues raised by Mr. Pennington's proposed text amendment, but recommends denial of Mr. Pennington's specific text amendment and its broad approach to the problem. Staff would ask for direction from the Planning Commission and Board of Supervisors on a more narrowly focused text amendment authorizing development on illegal or unbuildable lots on a case-by-case basis, taking into consideration factors such as compatibility with surrounding properties, and past County actions related to the parcel.

If the Planning Commission or Board of Supervisors wish to pursue Mr. Pennington's approach to the issue with this amendment, staff would recommend that it at least be deferred in order to allow staff to redraft and clarify some of the proposed language. The existing format is awkward and confusing. For example, it is not clear whether the limiting conditions of Subsection C relate back to Subsections A and B or only B. Subsection D incorporates the "standards" of Subsections A through C. The problem is that Subsections A and B do not have "standards." Rather, Subsections A and B have limitations – the plat had to have been created prior to January 1, 1980 for the new ordinance to apply. Is this a "standard" binding upon Subsection D? Clarification is needed.

During agenda review on January 25, 2007, the applicant's representative stated that there were some problems with the proposed amendment. He requested a continuance so that he might work on revisions. The Planning commission conducted a public hearing on January 25, 2007. By unanimous resolution, the Planning Commission continued the matter until its February meeting. In making the motion for continuance, Planning Commissioner McCarty requested that staff not work on amendments to the ordinance but to allow the applicant to suggest changes he deemed appropriate. The public hearing was left open.

Identify any other Departments, Organizations or Individuals that would be affected by this request:

Economic Development

ATTACHMENTS:

1. Proposed Revisions to the Zoning Ordinance

PROPOSED TEXT AMENDMENT TO FAUQUIER COUNTY ZONING
ORDINANCE PART 2, SECTION 10-206

Notwithstanding (1) anything to the contrary contained in this or any prior ordinance; and (2) the provisions of this and prior ordinances regarding "outlots," "remnants," and "substandard subdivisions," any lot (hereinafter "the non-conforming lot") that did not meet the minimum lot size, lot area and lot width requirements of the zoning ordinance in effect at the time of recordation of the plat of surveyor metes and bounds evidencing the same may be used for any use permitted in the zoning district in which the non-conforming lot is situated, provided that:

- A. the lot is described or depicted by metes and bounds or by plat of survey, and that such description or plat of survey was recorded amongst the land records of the Clerk's office of the Circuit Court of Fauquier County prior to January 1, 1980; or
- B. the lot was subdivided or was identified as a separate lot on the Fauquier County real property identification map and taxed as a separate parcel on or before January 1, 1980 provided, however, that
- C. except for the minimum lot size, lot area and lot width requirements of the zoning district, all of the requirements, provisions and regulations of this ordinance are satisfied, including but not limited to the bulk and use regulations for the zoning district in which the non-conforming lot is situated.
- D. Notwithstanding anything to the contrary contained in this or any prior zoning ordinance or the requirements set forth in subsections A, B, and C hereof, any non-conforming lot that has been improved by way of the construction of a dwelling may be used for residential purposes and any other use permitted in the district, provided, however that any expansions of such use or enlargement of such dwelling shall be allowed only upon compliance with the standards set forth in subsections A, B and C hereof.
- E. Any dwelling constructed subsequent to the effective date of this amendment on a non-conforming lot containing less than two (2) acres, the use of which is permitted by this section, shall be no larger than 1,500 square feet. For lots containing 2 or more acres a dwelling shall be no larger than 2,800 square feet.